Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 18-152
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	

COMMENTS OF EDISON ELECTRIC INSTITUTE AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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SUMMARY

The Edison Electric Institute ("EEI") and the National Rural Electric Cooperative Association ("NRECA") appreciate the opportunity to provide comments on several important issues raised in the Public Notice released by the Federal Communications Commission on May 14, 2018. The Public Notice seeks comment on a variety of issues related to interpretation of the Telephone Consumer Protection Act ("TCPA") and the Commission's rules following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC.* Among the issues on which the Commission seeks comment are (1) what constitutes an "automatic telephone dialing system" ("ATDS"), (2) how to treat calls to reassigned wireless numbers, and (3) how a called party may revoke prior express consent.

EEI and NRECA urge the Commission to confirm that: (1) to constitute an ATDS subject to the TCPA and the Commission's implementing rules, equipment must use a random or sequential number generator to store or produce numbers and dial such numbers without human intervention; and (2) only calls placed using actual ATDS capabilities are subject to the TCPA. With regard to automated calls and texts to phone numbers that have been reassigned, EEI and NRECA submit that the term "called party" refers to the party a caller reasonably expected to reach, and urge the Commission to adopt a "reasonable reliance" approach when determining whether a call was made with "prior express consent" of the called party. The commenters also support the creation of a comprehensive reassigned number database and a safe harbor for callers that inadvertently place calls and texts to phone numbers that have been reassigned without their knowledge. Finally, the commenters submit that callers should be permitted to prescribe a specific opt-out mechanism for calls and texts based on the type of call or text being placed, and it would be reasonable for callers to allow opt-out requests to be made through the same mechanism that is employed to obtain prior express consent.

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The Edison Electric Institute ("EEI") and the National Rural Electric Cooperative Association ("NRECA") respectfully submit these comments in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on May 14, 2018 in the above-referenced proceeding. The Public Notice seeks comment on issues related to interpretation of the Telephone Consumer Protection Act ("TCPA")[1] and the Commission's rules[2] following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*.[3] Among the issues on which the Commission seeks comment are (1) what constitutes an "automatic telephone dialing system" ("ATDS"), (2) how to treat calls to reassigned wireless numbers, and (3) how a called party may revoke prior express consent to receive calls and text messages placed using an ATDS or a prerecorded or artificial voice. EEI and NRECA appreciate this opportunity to submit comments in support of a new TCPA framework.

[1] 47 U.S.C. § 227.

[2] 47 CFR § 64.1200.

[3] *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (the "*2015 Declaratory Ruling and Order*")).

I. INTRODUCTION

EEI is the trade association that represents all U.S. investor-owned electric companies. Its members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia. The electric power industry supports over seven million jobs in communities across the United States. In addition to its U.S. members, EEI has more than 60 international electric company members, which operate in more than 90 countries, as International Members and hundreds of industry suppliers and related organizations as Associated Members. EEI's members are major users of telecommunications systems to support the goals of clean power, grid modernization and providing customer solutions.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million people in 47 states. Rural electric cooperatives are private, non-profit entities that are owned and governed by the members to whom they deliver electricity. They serve 56 percent of the nation, 88 percent of all counties, and 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States. Rural electric cooperatives serve the vast majority of the nation's persistent poverty counties (330 out of 353, or 93 percent). In all, about 15.5 percent of the 42 million Americans served by electric cooperatives live below the poverty line.

II. THE IMPORTANCE OF ELECTRIC UTILITY SERVICE-RELATED COMMUNICATIONS

Electric utilities are committed to providing safe, reliable, and efficient service. In furtherance of those efforts, many electric utilities have implemented notification programs to provide customers with the most-up-to-date information available regarding service issues. The notifications placed by electric utilities may convey information about planned or unplanned

outages, service curtailment, service restoration, natural disasters and other emergencies, delinquent bills that could lead to a cessation of service, or low balance alerts that allow customers to manage utility bills and consumption. These communications may be placed manually or using automated technologies, and they may be placed to wireless phones via voice or text messaging, in addition to residential landlines. Using these technologies increases the speed and reliability with which electric utilities can disseminate critical and potentially life-saving communications.

Electric utility customers need and demand this type of information. Some state regulations mandate notification programs,[4] and in other cases, EEI members have adopted these programs at the urging of regulatory authorities. Some NRECA member cooperatives have adopted these programs in response to regulatory authorities, and others have done so at the direction of their Board of Directors. Electric utilities are sensitive to customer complaints and strive to improve customer service by doing what they can to contact customers about service-related issues.

The elimination of or a limitation on an electric utility's ability to provide automated communications to customers would decrease customer satisfaction and increase the cost of delivering this important information.[5] The great number of electric utilities customers and the

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[4] *See, e.g.*, *The Board's Review of The Utilities' Response to Hurricane Irene*, Order Accepting Consultant's Report and Additional Staff Recommendations and Requiring Electric Utilities to Implement Recommendations, Docket No. EO11090543, Recommendation 23-G-3 (Bd. of Pub. Utils., N. J., Jan. 23, 2013).

[5] For example, according to the J.D. Power *2017 Electric Utility Residential Customer Satisfaction Study*, overall satisfaction among customers who receive outage information is higher than among those who do not receive such information. *See* http://www.jdpower.com/press-releases/jd-power-2017-electric-utility-residential-customer-satisfaction-study. .

time sensitivity of important service communications means that electric utilities generally do not have the option to manually call each of their customers, particularly during emergency situations. In addition to cost, utilizing live agents to make a large volume of outbound calls would significantly degrade service provided to customers who contact a utility for regular business issues.

III. ELECTRIC UTILITIES FACE LIABILITY UNDER THE TCPA

Like numerous other businesses throughout the country, large and small, some electric utilities have been subject to TCPA litigation, despite their good faith compliance efforts.[6] Also like many of the other TCPA defendants, the electric utilities subject to TCPA litigation were not engaged in the type of unsolicited telemarketing calls that the TCPA was intended to restrict.[7] Rather, they were trying to efficiently and in good faith communicate important, time-sensitive, service-related information to their customers.[8] Some of the alleged violations arose out of

[6] *See e.g.*, U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017).

[7] *See* S. Rep. 102-178 at 1-2 (1991) (identifying the purpose of the TCPA as to restrict unsolicited, automated calls to the home); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary reason for enacting the TCPA).

[8] In one case, an electric utility, hoping to improve the speed and efficiency of its communications with customers, adopted a text-messaging program to inform customers of power outages. The first message informed customers about the program and gave instructions on how to opt-out, and that initial message landed the company in federal district court. *See Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.). In another case, an electric cooperative was sued by the new subscriber of a phone number previously assigned to a coop member. The plaintiff alleged TCPA violations when the coop continued to send low-balance notifications to the new subscriber after the number was reassigned. Rather than contact the coop to opt-out, the new subscriber continued to receive phone calls and waited 13 months to initiate a lawsuit. *See* https://docs.house.gov/meetings/IF/IF16/20160922/105351/HHRG-114-IF16-Wstate-MockS-20160922.pdf.

automated calls to numbers that were at one time associated with current customers but were subsequently reassigned to new subscribers who did not consent to receive them. Some utilities have chosen to discontinue important service-related calls and texts to their customers due to the threat of TCPA litigation.

The Commission has offered some relief to energy utilities by confirming that, under the TCPA, providing a wireless telephone number to an energy utility constitutes "prior express consent" to receive, at that number, non-telemarketing, informational calls related to the customer's utility service, which are placed using an autodialer or an artificial or prerecorded voice.[9] Nevertheless, wireless telephone numbers are frequently relinquished and reassigned. In many cases, wireless numbers are reassigned without a utility's knowledge, and wireless number reassignments can be expected to be relatively higher in rural and lower-income areas, where many NRECA member cooperatives serve. Absent a reliable method for electric utilities to determine whether a phone number has been reassigned, they continue to be threatened by steep penalties and uncapped statutory damages for alleged violations.

Under the Commission's *2015 Declaratory Ruling and Order*, callers who place calls and texts to wireless numbers using an autodialer or prerecorded voice must have the prior express consent of the current subscriber, and they may only place one call or text in error to a wireless phone number that has been assigned to a new subscriber who did not consent to receive automated calls and texts. The "one call" safe harbor adopted by the Commission did not provide meaningful relief for electric utilities, as the first call or text to a wireless number after

[9] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Blackboard, Inc. Petition for Expedited Declaratory Ruling and Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Aug. 4, 2016).

reassignment often will not serve as an opportunity to obtain constructive or actual knowledge of reassignment, especially when more than one call is placed to the same number in a short period of time, such as during a storm or outage situation.

IV. WHAT CONSTITUTES AN "AUTOMATIC TELEPHONE DIALING SYSTEM"

The Commission seeks comment on what constitutes an ATDS and how the term "capacity" should be interpreted in light of the D.C. Circuit's decision in *ACA International v. FCC*, which set aside the Commission's interpretation. The term "automatic telephone dialing system" is defined in the TCPA as equipment "which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential generator; and (B) to dial such numbers."[10] In its 2015 *Declaratory Ruling and Order*, the Commission determined that Congress intended a broad definition, and the use of the word "capacity" in the definition does not exempt equipment that lacks the present ability to dial randomly or sequentially. Thus, in the Commission's view, any equipment that has the requisite "capacity" is an ATDS subject to the TCPA.[11] The D.C. Circuit rightly struck down that interpretation.

EEI and NRECA support the definition of an ATDS espoused by the U.S. Chamber Institute for Legal Reform, EEI, and others in the *Petition for Declaratory Ruling* filed on May 3, 2018.[12] Specifically, EEI and NRECA urge the Commission to confirm that:

(1) to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial such numbers without human intervention; and

(2) only calls placed using actual ATDS capabilities are subject to the TCPA restrictions.

[10] 47 U.S.C. § 227(a)(1)(A) and (B).

[11] *2015 Declaratory Ruling and Order* at ¶ 15.

[12] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Petition for Declaratory Ruling, CG Docket No. 02-278 (May 3, 2018).

The statutory language is straightforward, and equipment that cannot perform the functions prescribed in the statute cannot meet the definition. If the numbers to be called are not stored or produced using a random or sequential number generator, if human intervention is required to generate a list of numbers or to place a call to any list or set of numbers, or if equipment must be modified or upgraded to add autodialing capability, the equipment does not constitute an ATDS. Pursuant to the statutory definition of an ATDS, which requires a device to "store or produce telephone numbers to be called, using a random or sequential number generator," a device that simply calls from a set list of numbers uploaded to the device also does not constitute an ATDS. This interpretation would eliminate disputes over how much effort must be required for equipment to function as an ATDS.

Any other interpretation would be unreasonable. For example, electric utilities often place customer satisfaction survey and other service-related calls manually without the use of an autodialing feature. Absent clarification, dialing a number by hand would violate the TCPA if the equipment constitutes an ATDS. If callers use a device or equipment that can be modified and used for autodialing, they face the risk of TCPA liability when placing calls manually using such a device or equipment, even if the autodialing function has not been enabled.

Electric utilities and others need clear guidance when engaging in legitimate business communications. Absent an interpretation consistent with the definition proposed in the U.S. Chamber*'s Petition for Declaratory Ruling*, callers will continue to face a risk of TCPA liability when placing important, time-sensitive calls that their customers expect and desire manually, or

when placing calls using a smartphone or equipment that, if modified by software, would be capable of autodialing, even if it is not being used in that manner. Such an interpretation cannot be what Congress intended and does not further the purpose of the TCPA, which is to restrict unsolicited calls.

V. CALLS TO REASSIGNED NUMBERS

The Commission seeks comment on several issues pertaining to automated calls and texts placed to wireless phone numbers that have been reassigned. Specifically, the Public Notice seeks comment on how to interpret the term "called party" in the TCPA, whether the Commission should maintain its "reasonable reliance" approach to "prior express consent," and whether a reassigned numbers safe harbor is necessary for callers that place calls and texts to phone numbers previously associated with subscribers who consented to receive such communications, but which numbers are subsequently reassigned to new subscribers. As the number of wireless number reassignments increases, so does the threat of TCPA litigation arising out of calls placed to numbers that have been reassigned. EEI and NRECA urge the Commission to maintain a "reasonable reliance" approach when determining whether a call was made with the requisite "prior express consent" of the called party, and the commenters also support the creation of a comprehensive reassigned number database and a safe harbor for callers that inadvertently place calls to numbers that have been reassigned without their knowledge.

A. The Commission Should Maintain a Reasonable Reliance Approach

It is reasonable for the Commission to conclude that the "called party" for purposes of calls and texts placed using an ATDS to phone numbers that have been reassigned is the party the caller reasonably expected to reach, absent a reliable way to ascertain whether a number has been reassigned. It is also reasonable for the Commission to conclude that a caller does not violate the TCPA when it places a call using an ATDS to a number that has been reassigned to a

new subscriber without the caller's knowledge if (1) the caller received prior express consent from the previous subscriber who it intended to call, and (2) the caller had a process in place for ascertaining whether a number had been reassigned and nevertheless inadvertently placed a call to a subscriber who did not consent to receive it. Such findings fulfill the intent of Congress that the TCPA not prohibit normal and expected business communications,[13] and are consistent with the Commission's determination that providing a phone number to a caller evidences prior express consent to be called at that number, absent instructions to the contrary.[14]

As the D.C. Circuit and the Commission have acknowledged, the term "called party" in the context of calls to reassigned numbers is ambiguous and susceptible to different interpretations.[15] In the *2015 Declaratory Ruling and Order*, the Commission followed a "reasonable reliance" approach when determining whether a caller had the requisite "prior express consent" under the TCPA, but concluded that callers cannot reasonably rely on prior express consent beyond one call to a number that has been reassigned to a new subscriber.[16] In *ACA International v. FCC*, the court did not strike down the Commission's "reasonable reliance" approach for consent, but found fault with the arbitrary and capricious "one call" safe harbor."[17]

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[13] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, *Declaratory Ruling*, 27 FCC Rcd at 15395, para. ¶ 8 (2012) (quoting H.R. REP. NO. 102-317, 1st Sess., 102nd Cong. (1991) at 17).

[14] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 at ¶ 31 (1992).

[15] *ACA Int'l, et al. v. FCC*, 885 F.3d at 706-07; *2015 Declaratory Ruling and Order* at ¶ 74.

[16] *2015 Declaratory Ruling and Order* at note 312.

[17] See *ACA Int'l*, 885 F.3d at 709.

B. A Reassigned Numbers Safe Harbor is Necessary

EEI and NRECA support the creation of a comprehensive, affordable reassigned numbers database for wireless numbers that callers can access to determine whether a phone number has been reassigned to a new subscriber. Nevertheless, a safe harbor would be necessary for callers that access and use such reassigned database, make use of other TCPA compliance solutions, or take other reasonable steps to prevent calls to numbers have been reassigned. It will simply be impossible for callers to ascertain every instance in which a number has been reassigned, despite their best efforts. The Commission has itself acknowledged that callers using reasonably available tools may not learn of a reassignment before placing a call to a new subscriber.[18]

In addition, there is no guarantee that every reassigned number will appear in a database, and there will likely be a delay between the time a number is relinquished and reassigned and the time the information is reported in the database. Of particular concern for electric utilities is they may send more than one alert in a day, week, or month, for example to notify about a service outage and subsequent restoration efforts or to notify about a payment issue that may lead to service curtailment. Electric utilities should not be required to access a reassigned number database more frequently than other callers.

The value of a reassigned number database is also limited for electric utilities to the extent it does not provide necessary information about reassigned numbers associated with family calling plans (where phone numbers may be registered to a member of a household who is not the user of the number) or numbers assigned to a phone for which no customer identification information is available, such as a prepaid phone. For example, some electric utility customers reside in households where electric service may be in one family member's name, but the phone number associated with the account is held by a different family member, and payment for

[18] *2015 Declaratory Ruling and Order* at ¶ 88.

electric service may be made by yet a different person who is not associated with the account. These types of situations make it difficult for electric utilities to identify who is the current holder of a phone number if the information in the database does not match the electric utility's record.

To be valuable, the Commission should develop a reassigned number database in combination with adopting a safe harbor that serves as an affirmative defense from TCPA liability for callers that make use of the database to locate and remove reassigned numbers from their records. In implementing such a safe harbor, it would not be unreasonable for the Commission to require that callers access the database with a specified frequency, such as every calendar quarter. Such a safe harbor makes sense when a caller takes steps to scrub its lists in a regular and systematic way. The Commission also should consider extending a safe harbor to callers that make use of other TCPA compliance solutions or, as other solutions develop, take other reasonable steps to prevent calls to reassigned numbers.

Establishing these types of protections would encourage callers to proactively scrub their phone number lists to eliminate reassigned numbers and manage their costs. These types of safe harbor protections would promote predictability, fairness and efficiency in the TCPA enforcement process, enabling legitimate callers to use the best data available to comply with the TCPA and eliminate costly, time-consuming investigations into inadvertent violations.

C. The Commission Has the Authority to Establish a Safe Harbor

The Commission has the authority to establish a safe harbor for reassigned numbers. The Commission has adopted similar protections from liability when interpreting the term "called party,"[19] and the concept of a safe harbor that involves the use of a reassigned numbers database

[19] *See e.g., 2015 Declaratory Ruling and Order* at ¶ 75 ("In construing the term "prior express consent" in section 227(b)(1)(A), we consider the caller's reasonableness in relying on consent.

is consistent with other grace periods the Commission has extended for TCPA compliance.[20] In its *2015 Declaratory Ruling and Order*, the Commission rejected a strict liability approach for calls to reassigned numbers because such an approach would be "severe" and "demand the impossible."[21]

It is also significant that the D.C. Circuit in *ACA International v. FCC* did not invalidate the concept of a safe harbor or the Commission's rejection of a strict liability approach. Rather, the court took issue with the arbitrary and capricious "one call" safe harbor for calls/texts to reassigned numbers because the Commission did not provide a "reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message."[22] The court did not question the Commission's authority to adopt a safe harbor that is broader than the one adopted in the *2015 Declaratory Ruling and Order*.

VI. REVOCATION OF PRIOR EXPRESS CONSENT

In the *2015 Declaratory Ruling and Order*, the FCC confirmed that individuals must be able to revoke their consent to receive autodialed and prerecorded or artificial voice calls and texts "through any reasonable manner." The Commission now seeks comment on what opt-out methods would be "sufficiently clearly defined" and easy to use for unwanted calls and texts subject to the TCPA. Electric utilities and other callers who have established relationships with

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… The caller in this situation cannot reasonably be expected to divine that the consenting person is not the subscriber or to then contact the subscriber to receive additional consent.").

[20] *See e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, FCC 04-204 ¶ 7 (2004) (establishing a safe harbor for autodialed or artificial or prerecorded message calls to wireless numbers recently ported from a wireline service).

[21] *2015 Declaratory Ruling and Order* at note 312 (citing Dissenting Statement of Commissioner Ajit Pai at 7).

[22] *ACA Int'l*, 885 F.3d at 709.

customers and must periodically communicate with them should be permitted to prescribe specific methods for their customers to revoke prior express consent, provided they take reasonable steps to inform customers of the manner in which they may revoke consent. Callers could provide such information in correspondence to customers, during a call, in a text message, or through other means that provide reasonable notice to customers. In providing notice of the ways to revoke consent, a caller may inform the customer of the possible disadvantages of revoking consent so that the customers make an informed decision.

Possible methods that callers prescribe for revoking consent could include (without limitation) an e-mail sent to a dedicated e-mail address, a phone call placed to a designated phone number, or a form available on the caller's website. Such methods would enable callers to track opt-out requests and verify that a customer made a conscious decision to revoke consent. Another option would be for callers to prescribe a specific opt-out mechanism based on the type of call or text being placed. For example, pushing a standardized code during a phone call or texting "stop" in response to a text message would be easy to use and would enable callers to more easily track opt-out requests. It would also be reasonable for callers to allow opt-out requests to be made through the same mechanism that is employed to obtain prior express consent. Providing callers with flexibility to prescribe specific opt-out mechanisms is necessary so they have a reliable and defined process for receiving, recording, and honoring opt-out requests. Without this flexibility, there may be disputes as to whether a customer in fact revoked consent, and that uncertainty could subject callers to substantial litigation risk.

VII. CONCLUSION

EEI and NRECA appreciate the opportunity to submit these comments on the TCPA framework. EEI and NRECA support an interpretation of what constitutes an "automatic telephone dialing system" that better comports with the intent of Congress and provides clear guidance for callers to determine whether the calls and texts they place are subject to the TCPA. EEI and NRECA also urge the Commission to maintain a "reasonable reliance" approach when determining whether a call was made with the requisite "prior express consent," of the called party, and support the creation of a comprehensive reassigned number database and a safe harbor for callers that inadvertently place calls to numbers that have been reassigned without their knowledge. Legitimate, time-sensitive, and (in many cases critical) communications that are expected and desired should be encouraged, not discouraged.

Respectfully submitted,

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